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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MILDRED JEAN MATTHEWS,

Defendant and Appellant.

B288083

(Los Angeles County  
Super. Ct. No. YA090234)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed with directions.

Robert F. Somers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal follows defendant Mildred Jean Matthews' conviction for assault with a deadly weapon, felony vandalism, and corporal injury on a spouse. She challenges the sufficiency of the evidence to support the conviction for assault with a deadly weapon and argues that the trial court should have reduced that count to a misdemeanor. Defendant also argues that the trial court abused its discretion in denying her motion to strike a prior serious or violent felony. Finally, defendant argues that the case must be remanded to permit the trial court an opportunity to decide whether to strike a Penal Code<sup>1</sup> section 667, subdivision (a) enhancement under a newly enacted statute affording trial courts such discretion.

We conclude that defendant's challenge for insufficient evidence asks us to reweigh credibility, focus only on evidence in support of her defense, and ignore evidence that supported the jury's verdict. We cannot do so under the standards of review that guide this appeal. We conclude defendant's substantial criminal history of violence and the facts of this case support the trial court's refusal to sentence defendant's crime as a misdemeanor. For the same reasons, the trial court did not abuse its discretion in not striking a prior serious or violent felony. We, however, remand the case to the trial court so that it may consider whether to exercise its newly granted discretion to strike the section 667, subdivision (a) enhancement.

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<sup>1</sup> All statutory citations are to the Penal Code.

## **FACTUAL BACKGROUND**

At the time of trial, in 2017, defendant and Gary Hilliard were in a relationship for over 20 years and were married for two years. Defendant had two sons, Timmy Ramey and Jimmy Dozer. Ramey and Dannielle Burris had two children, O. and D. Dozer and Burris had one child, T., who was less than one year old in May 2013, when the conduct underlying defendant's conviction for assault occurred. Defendant is the grandmother of O., D., and T.

In May 2013, Burris was dating Damien Johnson. Ghia Johnson (Johnson)—the person defendant assaulted with a deadly weapon—was Damien's mother.

### **1. Assault on Johnson**

On May 28, 2013, Ghia Johnson met defendant for the first time. Burris drove Johnson's car to defendant's home in order to pick up D. and O. Johnson, who was seated in the passenger seat, rolled down the window to greet defendant. Defendant threw hot sauce on Johnson's face and in her eyes.

According to Johnson, defendant then leaned into the car holding a hammer and "whacked" Johnson's face with the hammer. Johnson felt "cold, hard pain" and tried to move to the other side of the car. Afterwards, Johnson's face ached, and it was swollen and lightly bruised.

According to Burris, defendant was waiting outside her home when Burris and Johnson arrived in Johnson's car. After defendant threw hot sauce on Johnson's face, defendant pulled a hammer from her waist and hit Johnson twice in the face. Defendant told Burris that Burris should have brought T. (defendant's grandchild) for a visit.

Defendant also used the hammer repeatedly to hit the front and back windshields of Johnson's car. Defendant also hit the side panel of the car, near where Johnson was seated.

Ramey (defendant's son) saw defendant hit the window, windshield, and hood of Johnson's car with a hammer. Ramey did not see defendant hit Johnson. Ramey heard defendant accuse Burris of "keeping my grandbaby away."

Hilliard testified that defendant was upset because O. and D. told her that Johnson hurt and chastised them. Hilliard observed defendant in the front yard when Johnson arrived with Burris. Defendant held a hammer in her right hand. Hilliard testified that defendant did not hit Johnson.

## **2. Vandalism**

Defendant repeatedly hit Johnson's car with her hammer. She dented the car and broke the windshield. Damage to the windshield and two windows cost \$900 to fix.

## **3. Corporal Injury on a Spouse**

On September 12, 2017, defendant and Hilliard argued. Defendant hit Hilliard with a bar she swung at his head. Defendant also scratched Hilliard's face, cutting his lip and skin under his eye.

Defendant previously had stabbed Hilliard under his left armpit. Defendant also previously punched Hilliard in the mouth.

## **4. Defendant's testimony**

Defendant admitted hitting Johnson's car with a hammer but denied hitting Johnson. Defendant testified that D. and O. told her Johnson hit them. Defendant testified that this

information upset her, and as a result, she “mixed up a little pepper” and “threw it in her [Johnson’s] face.” Defendant then tried to pull Johnson out of the car. Defendant explained, “I wanted that woman for hitting my grandbabies.”

Defendant admitted that she had a hammer and that she “pulled it out to beat the car.” Defendant testified that she hid the hammer under her blouse. Defendant testified that she broke Johnson’s back windshield by hitting it with a hammer three times.

Defendant “kept hitting the car” because she thought it was Burris’s car. Defendant testified that she hit the car because she had given Burris \$1,200. According to defendant, “I hit the car. I tried to tear it up because I gave her money. She took my baby from me, and I raise T[ ].” “I thought it [the car] was hers, and I was trying to take . . . \$1,200 off of it.” Defendant said, “I gave you \$1,200 and you took my baby.” Defendant then “went back and start tearing the car up.”

Defendant testified, “I never hit neither one of them [Johnson or Burris] with that hammer. If I did, they brains would have been busted because I was angry. You see what I did to the car. I was strong enough to hurt her if I wanted to and the woman too, but it was never to them, and they lied.”

Defendant testified, “I don’t attack Gary [Hilliard]. Gary provoke it.” “If I didn’t love him, my kids would have killed him.” Defendant described Hilliard as the aggressor. She testified, “I’ve never been violent.”

Defendant acknowledged that she scratched Hilliard’s face but, according to her, she did so only after he “threw” her against a wall. She tried to “tear . . . off” his lip but only after he bit her

finger. With respect to the prior incident, defendant testified that she did not stab Hilliard, but instead he fell on a knife.

## **PROCEDURAL BACKGROUND**

### **1. Amended information**

In an amended information, the People charged defendant with two counts of assault with a deadly weapon. The count identifying Burris as a victim later was dismissed, and the remaining count identified Johnson as the victim. The People also charged defendant with criminal threats, vandalism of over \$400, and injuring a cohabitant or spouse. With respect to the last offense, it was alleged that defendant used a deadly and dangerous weapon.

The People alleged defendant suffered one prior serious or violent felony within the meaning of the Three Strikes law and within the meaning of section 667, subdivision (a)(1).

### **2. Denial of defendant's section 1118 motion**

Following the presentation of evidence by the prosecutor, defendant argued pursuant to section 1118 that there was insufficient evidence of the assault on Johnson. The trial court denied defendant's motion to dismiss the assault with a deadly weapon charge, explaining: "[T]here was testimony by Ms. Johnson that she was struck in the face. And then Ms. Burris testified that she saw the defendant strike Ms. Johnson in the face with a hammer."

### **3. Verdict**

Jurors convicted defendant of assault with a deadly weapon on Johnson, vandalism in an amount over \$400, and injuring a

spouse. Jurors found defendant not guilty of criminal threats. Jurors found the allegation that defendant used a deadly or dangerous weapon in connection with injury to a spouse not true.

Defendant admitted that she suffered a serious or violent felony conviction in 1999 of willful infliction of corporal injury on a spouse or cohabitant. For purposes of section 667, subdivision (a)(1), defendant admitted that she suffered a serious or violent felony and served time in prison.

#### **4. Defendant's motions at sentencing**

Defendant moved to dismiss the case for insufficiency of the evidence or, in the alternative, to reduce the conviction for assault to a misdemeanor. The trial court rejected the motion. In the context of rejecting the motion, the trial court indicated that it "felt" that "there was no instance where she [defendant] tried to strike her [Johnson] . . . with the hammer inside of the car. I know there was some testimony as to that, but I think the jury really focused on the other issues." The prosecutor then stated that the People's argument was "that the [section] 245 was a result of the defendant striking the windshield right in front of where the victim was sitting at the time."

During the same hearing, the trial court observed that there were two theories that supported the jury's verdict on the assault count: one, that Johnson was "sitting in the seat at the time the hammer strikes were coming"; and two, that "there's testimony that [defendant] actually reached into the vehicle with the hammer." The trial court further observed that the latter testimony was "contradicted in part."

The trial court explained its reasons for denying defendant's request to reduce the assault to a misdemeanor: "The conduct that the defendant has engaged in in this instance,

and also taking into consideration her past conduct, this is not misdemeanor conduct.” The trial court “interpret[ed]” defendant’s request as an additional motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court summarized defendant’s prior convictions, indicated it understood its discretion, and denied defendant’s request to strike the prior strike conviction.

## **5. Probation report**

The probation report stated that defendant’s adult criminal history began in 1970. She was convicted of fighting or disturbing another by loud or unreasonable noise. In 1977, defendant was convicted of conspiracy and theft of access cards. Defendant was convicted in 1999 of corporal injury to a cohabitant (the same charge as in the current case). Defendant was convicted in 2000 of willful cruelty to a child. Defendant committed the current crime against Hilliard while on bail for the other offenses charged in this case.

## **6. Sentence**

For the assault, the trial court found the following factors in aggravation: (1) defendant armed herself with a weapon; (2) the attack involved planning; and (3) defendant testified that she was waiting for the victim. The court found the fact that Johnson was inside a vehicle to be a mitigating factor. The trial court sentenced defendant to four years, consisting of the low term of two years doubled for the prior strike conviction. The court imposed an additional five-year term for the section 667, subdivision (a) enhancement.



For the vandalism, the court stayed a two-year sentence pursuant to section 654. The court imposed a consecutive two-year sentence for the willful infliction of corporal injury.

## DISCUSSION

### 1. Substantial Evidence Supported Defendant's Conviction For Assault With A Deadly Weapon

Defendant challenges the sufficiency of the evidence of assault with a deadly weapon on Johnson. “ ‘ “When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.” ’ ” (*People v. Booker* (2011) 51 Cal.4th 141, 172.)

Section 245, subdivision (a)(1) penalizes an assault with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury. Assault is an “unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) “[F]or an object to qualify as a deadly weapon based on how it was used, the defendant must have used the object in a manner not only

capable of producing but also *likely to produce* death or great bodily injury.” (*In re B.M.* (2018) 6 Cal.5th 528, 530.) “Analysis of whether the defendant’s manner of using the object was likely to produce death or great bodily injury necessarily calls for an assessment of potential harm in light of the evidence. . . . [A] mere possibility of serious injury is not enough. But the evidence may show that serious injury was likely, even if it did not come to pass.” (*Id.* at p. 535.) The extent of the actual injury is also relevant. (*Ibid.*)

In *In re B.M.*, *supra*, 6 Cal.5th 528, our high court found insufficient evidence to support assault with a deadly weapon when a butter knife was used only against a victim’s legs, which were covered by a blanket. The high court emphasized that the knife was not used in the area of the victim’s head or face. (*Id.* at p. 536.) The court explained that the defendant may have been able to cause serious injury if she “had applied greater force, if she had applied the same force to . . . exposed legs, if she had used the knife on [the victim’s] head, face, or neck, or if she had wielded the knife in an uncontrolled or unpredictable manner. But the inquiry must focus on the evidence of how B.M. actually used the knife, not on various conjectures as to how she could have used it.” (*Id.* at p. 538.)

Turning to this case, defendant argues that there was no evidence she used the hammer as a deadly weapon because she “did not contact Johnson with the hammer when she struck the car’s front window.” Defendant further argues that not only did she refrain from hitting Johnson “in the head and face” but also, she “avoided hitting Johnson altogether by only hitting the car with the hammer.” Defendant further states that she “never touched Johnson with the hammer.”

Defendant's argument ignores the appropriate standard of review, which requires this court to review the evidence in the light most favorable to the verdict. (*People v. Booker, supra*, 51 Cal.4th at p. 172.) This is true even if the evidence "might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 639.)

Applying this standard of review, Johnson's and Burris's testimony was sufficient to support defendant's conviction for assault with a deadly weapon. Jurors could have concluded that by hitting Johnson in the face with a hammer, defendant used the object in a manner capable of producing and likely to produce great bodily injury. (*In re B.M., supra*, 51 Cal.5th at p. 530 [describing test]; see also *People v. Russell* (1943) 59 Cal.App.2d 660, 665 [location on body where weapon used relevant in determining if weapon likely to cause great bodily injury].) Defendant's own testimony supported this conclusion as she testified that she was strong enough to "bust[ ]" Johnson's brains and she "wanted to snatch" Johnson for "hitting my grandbabies."

The evidence that defendant struck Johnson in the face, a vulnerable part of the body, distinguishes this case from *People v. Beasley* (2003) 105 Cal.App.4th 1078, in which the court found insufficient evidence of assault with a deadly weapon when the defendant used a broomstick to strike the victim's arms and shoulders, not "her head or face." (*Id.* at p. 1087.) Finally, to the extent defendant argues Johnson and Burris's testimony was not credible, we reject the argument.<sup>2</sup> "Issues of witness credibility are for the jury." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

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<sup>2</sup> We are cognizant that at the sentencing hearing, the trial court stated it "felt" that defendant did not strike Johnson. But in denying defendant's motion under section 1118 to dismiss

## **2. The Trial Court Did Not Abuse Its Discretion In Denying Defendant's Request To Reduce The Assault To A Misdemeanor**

Defendant argues that the trial court abused its discretion in denying her request to sentence her to a misdemeanor on the assault conviction. Defendant's argument is based on a summary of the evidence in the light most favorable to her and fails to acknowledge her history of violent conduct or the aggravating factors identified by the trial court at sentencing.

A trial court has discretion to sentence a wobbler such as assault with a deadly weapon as a felony or misdemeanor. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976–979.) We review a trial court's exercise of that discretion for abuse of discretion. (*Id.* at p. 981 [noting the “extremely deferential and restrained standard by which appellate courts are bound in these matters”].) A trial court may consider the following circumstances in exercising its discretion: “[T]he nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the

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the assault charge for insufficient evidence, the trial court expressly cited Johnson's testimony that “she was struck in the face” and Burris's testimony that “she saw the defendant strike Ms. Johnson in the face with the hammer.” Our standard of review requires consideration of the evidence presented at trial, not the trial court's posttrial feelings.

We thus need not consider defendant's remaining arguments challenging the sufficiency of the evidence of assault with a deadly weapon because they are based on the incorrect premise that there was insufficient evidence that she hit Johnson's face with the hammer.

trial.’ ” (*Id.* at p. 978.) The trial court also may consider the offense, the offender, and the public interest. (*Ibid.*)

Turning to this case, defendant demonstrates no abuse of discretion. In the current proceedings, defendant was convicted of three crimes including assault with a deadly weapon. The current convictions as well as her prior strike conviction indicate that she regularly used violence. At trial, defendant admitted multiple incidents of violence with her husband and admitted that she threw hot sauce in Johnson’s eyes. Defendant further admitted that she used a hammer on Johnson’s vehicle because she was disappointed that Burris did not bring T. to defendant’s home. Defendant waited for Johnson with a hammer hidden under her blouse and hot sauce in her hand. Moreover, defendant admitted that she could have severely hurt Johnson with the hammer. Given these circumstances, the trial court acted well within its discretion in sentencing defendant to a felony rather than a misdemeanor.

### **3. The Trial Court Acted Within Its Discretion In Denying Defendant’s *Romero* Motion**

In *Romero*, our high court held that the Three Strikes law did not remove a sentencing court’s discretion to dismiss a defendant’s prior strike or strikes to achieve a punishment in the furtherance of justice. (*Romero, supra*, 13 Cal.4th at p. 504.) In *People v. Williams* (1998) 17 Cal.4th 148, the Supreme Court explained that a sentencing court should apply the following standard: “[W]hether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though

he had not previously been convicted of one or more serious and/or violent felonies.” (*Id.* at p. 161.) We review the trial court’s refusal to dismiss a prior strike conviction for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374–375.)

The trial court acted well within its discretion in denying defendant’s motion to strike her prior conviction. Defendant did not learn from her prior conviction for corporal injury on a cohabitant because she was convicted of the same charge in this case. In addition to injuring her spouse, defendant planned and executed an attack on Johnson and vandalized her vehicle, causing significant damage. Defendant’s own testimony demonstrated that she routinely used violence, and she was on bail at the time she inflicted corporal injury on her husband.

#### **4. The Case Must Be Remanded For The Trial Court To Exercise Its Discretion Under A Newly Enacted Law**

Under prior law, a trial court did not have the authority “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (Former § 1385, subd. (b).) Senate Bill No. 1393, adopted September 30, 2018, amended sections 667 and 1385 to omit this restriction, thus granting trial courts discretion to strike the prior conviction as it relates to the five-year sentence enhancement under section 667, subdivision (a)(1). (See Sen. Bill No. 1393 (2017–2018 Reg. Sess.); *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) The amendments became effective January 1, 2019. (Cal. Const., art. IV, § 8, subd. (c)(1).)

Defendant argues that Senate Bill No. 1393 applies retroactively to his case, and we therefore should remand so the trial court may exercise its discretion whether to strike the

serious felony enhancement. Respondent acknowledges that the statute applies retroactively to defendant. Respondent argues that remand is not warranted in this case because the trial court indicated that it would not have dismissed the enhancement.

We conclude that the record is silent concerning how the trial court would have exercised its discretion. Although the trial court denied defendant's motion to reduce the assault to a misdemeanor and to strike a prior conviction under the Three Strikes law, the trial court sentenced defendant to the low term on assault with a deadly weapon. The fact that the court rejected the argument that defendant fell outside the spirit of the Three Strikes law does not conclusively demonstrate that the trial court would have denied a request to strike a prior serious felony enhancement if it then had the discretion to do so. The trial court expressed no intention to impose the maximum sentence. Remand therefore is necessary for the trial court to exercise its newly-obtained discretion. (Cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426–427; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081–1082.)

## **DISPOSITION**

The judgment is affirmed. Upon remand, the trial court shall determine whether to strike the section 667, subdivision (a)(1) enhancement. If the court strikes the enhancement, the court shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.